Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 15789/2015

In the matter between:

RIANA LEMMER N.O.	**Applicant**
and	
THE MASTER OF THE HIGH COURT, CAPE TOWN	**First Respondent**
HEINDRE KEITH RADEMAN	**Second Respondent**
RED CROSS CHILDRENS HOSPITAL	**Third Respondent**
SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS	**Fourth Respondent**
SCHOOL FOR THE BLIND, WORCESTER	**Fifth Respondent**
RAPE CRISIS, HELDERBERG	**Sixth Respondent**
ESTATE LATE BERND BORNGRÄBER	**Seventh Respondent**
HENRICO JOHAN GROBBELAAR	**Eighth Respondent**
JOHANNA PETRONELLA INGRAM	**Ninth Respondent**
JOHANNES GEORGE INGRAM	**Tenth Respondent**
HEINDRUN CHALIS	**Eleventh Respondent**
LYNDSAY ROSIN MITCHELL	**Twelfth Respondent**
MEALS ON WHEELS, SOMERSET WEST	**Thirteenth Respondent**

Court: Justice J Cloete

Heard: 2 February 2016

Delivered: 2 March 2016

JUDGMENT

CLOETE J:

Introduction

[1] This is an application to extend the applicant's powers as interim curator of the estate of the late Laureen Borngräber (the deceased) which is opposed only by the second respondent (Rademan). He is the executor nominated in the joint will of the deceased and her late husband, as well as a potential beneficiary of the deceased's estate.

[2] It is coupled with a counter-application by Rademan for an order directing the Master to accept or reject the will (the further relief sought to *'rescind'* the Master's failure to make a decision in this regard was abandoned during argument).

Background

[3] The applicant, a practicing attorney, was previously appointed as curator bonis of the deceased's estate on 25 March 2008. On 27 October 2009 she was appointed curator ad personam to the deceased and this appointment was confirmed on 20 November 2010. The deceased passed away on 5 August 2015 whereupon the applicant's appointments automatically terminated.

[4] During the period of her erstwhile appointment as curator bonis the applicant instituted two actions. The first was to have the will declared invalid on the basis that the deceased's signature was forged, alternatively that when the deceased signed the will she lacked the mental capacity to do so. The second is to recover a sum of about R3 million from Rademan which it is alleged he misappropriated from the deceased's estate. The pleadings in these actions have closed but given that the applicant's powers as curator bonis terminated upon the death of the deceased she has been precluded from prosecuting them any further.

[5] On 14 August 2015 the Master appointed the applicant as interim curator after having indicated that in light of the pending litigation in relation to the will he was not prepared to accept or reject it and would await the outcome of the court's decision. Such appointment was made in terms of s 12 of the Administration of Estates Act 66 of 1965 (*'the Act'*) which provides:

> *'12(1) The Master may appoint an interim curator to take any estate into his custody until letters of executorship have been granted or signed and sealed, or a person has been directed to liquidate and distribute the estate.*
>
> *…*
>
> *(3) An interim curator may, if specially authorised thereto by the Master –*
>
> *(a) collect any debt and sell or dispose of any movable property in the estate, wherever situate within the Republic;*
>
> *(b) subject to any law which may be applicable, carry on any business or undertaking of the deceased; and*
>
> *(c) release such money and such property out of the estate as in his opinion are sufficient to provide for the subsistence of the deceased's family or household.'*

[6] The letters of interim curatorship were issued in terms of s 12(1) and merely record the applicant's appointment and that she is *'authorised as such to take into custody'* the estate of the deceased. The applicant has not approached the Master for any of the further powers contained in s 12(3).

[7] The applicant launched this application for orders authorising her to continue with the pending litigation, to place the deceased's assets in safe custody, to pay any attendant disbursements and also to make decisions regarding the deceased's substantial share and investment portfolio (which at April 2015 amounted to R74.6 million, the total value of the estate being R80.8 million excluding the sum claimed from Rademan). She also sought authority to pay the deceased's funeral expenses; the salary of the deceased's employee for August 2015 and the deceased's medical and similar expenses, to which Rademan agreed and accordingly these are no longer in issue.

[8] The applicant initially only cited the Master as a respondent. On 10 September 2015 Rademan was by agreement granted leave to intervene as a party. On 16 November 2015 a further order was made directing that the other potential beneficiaries also be joined. The terms of that order are not entirely clear. Paragraph [b] stipulates that the applicant *'moet voeg* [hulle] *as belanghebbende partye tot die aansoek'* and paragraph [f] that *'indien enige van die respondente wat hierin gevoeg word…'*. The applicant did not make any formal application thereafter for their joinder but complied with the service provisions contained in that order. Furthermore, the 8th, 9th, 10th and 13th respondents filed affidavits supporting Rademan's opposition on the basis that they considered the contents of his affidavit *'alarming'*, while at the same time stating that

they would abide the court's decision. Accordingly there can be no question of prejudice to any potential beneficiary and it is not necessary to deal with this aspect any further.

[9] Although Rademan launched a scathing attack on the applicant's professional integrity (and which she dealt with fully in reply), it is common cause that he has not sought to review the Master's decision to appoint her as interim curator (nor, for that matter, did he attempt to have her discharged as curator bonis prior to the death of the deceased). Furthermore, in a report from the Master dated 13 January 2016 it was stated that:

> *'3. …Die applikant is egter reeds vir jare bekend aan my, en hou 'n verskeidenheid aanstellings beide as eksekutrise en as* curator bonis*, en ek is nie bewus van enige negatiewe aspekte oor haar werk nie, en sy is beslis in "good standing" by hierdie kantoor.'*

Issue in dispute

[10] During argument Rademan's counsel made it clear that he did not intend to deal with the myriad disputes of fact but would focus only on a point in limine which relates to the issue of the applicant's locus standi.

[11] Rademan's contention is that the Act does not make provision for a court to extend the powers of an interim curator to pursue litigation in relation to the validity of the will of the deceased concerned. It is submitted that the purpose of s 12 is to preserve the estate pending the appointment of an executor. The Act provides that an executor

(whether testamentary or dative) must be appointed by the Master without delay for the purpose of attending to the administration and winding up of the estate, and that only the executor so appointed will thus have locus standi to pursue litigation of this nature. To quote from the heads of argument filed on Rademan's behalf:

> *'The prayers sought in the notice of motion, especially the prayers dealt with in paragraphs (a)(i) and (vi) are clearly couched in such wide terms, that it requires little argument to convince the Honourable Court, with respect, that these duties would be exclusively duties that an appointed Executor should perform.'*

[12] Furthermore, so it is argued, the applicant as interim curator lacks locus standi at common law to ask the court to extend her powers in this manner, given that she has no interest in the litigation in relation to the will. It is submitted that the absence of locus standi cannot be cured by having it conferred upon her by a court in the exercise of its inherent jurisdiction, given that such jurisdiction cannot be invoked in a manner which conflicts with statutory provisions or the common law.

[13] Rademan thus contends that it is imperative that the Master be ordered to accept or reject the will. It he accepts it, the individuals with a direct interest i.e. those who would qualify as beneficiaries in terms of the laws of intestate succession, would be the only individuals entitled to challenge the will's validity. If however he rejects it, only the beneficiaries (one of whom potentially is Rademan) or the nominated executor (i.e. Rademan) would have locus standi to challenge that decision.

[14] In support of this argument Rademan relies on *Meiring's Executor Dative v Meiring's Executors Testamentary* (1877) 7 Buch 93. There a husband and wife executed a

mutual will, appointing the survivor and their children the heirs of the first dying. The wife died and the husband remarried. He and his new wife jointly executed a will in which he sought to revoke the first will insofar as he had the power to revoke it and appointed his new wife and the children of their marriage as beneficiaries. The executor of the first will instituted proceedings to set aside the second will on two grounds. The first was that the husband, having adiated under the first will, was precluded from revoking that will; the second was that the husband executed the later will as a result of undue influence at a time when he was mentally incompetent. The executors of the second will excepted on the ground that no cause of action had been disclosed. At page 95 it was held:

> *'The question of more immediate importance is whether the plaintiff has any locus standi at all for the purposes of this suit. He claims the right of instituting this action by virtue of his appointment as executor dative of the testator's first wife's estate, which, he alleges, makes him the protector of her will. Now admitting that the plaintiff is bound by his office to carry out the provisions of her will and to collect all the assets of her estate, it by no means follows that he has adopted the proper course for the attainment of his objects. There is no allegation in the declaration that the defendants have interfered with his duties or withheld property which belongs to the estate which he administers; and if there had been such an allegation, the plaintiff's proper course would have been to institute an action to restrain the defendants from interfering with him in the exercise of his duties or to recover the property wrongfully withheld by the defendants. But it is sought to impeach the second will on the ground that it revokes the first will which the testator's own acts had rendered irrevocable…'*

> and at page 96:

> *'As executor dative of the testator's first wife the plaintiff is bound to carry out the provisions of her will but only in so far as it relates to property disposed of by her and directions given by her. His appointment as executor dative of her estate does not*

> *confer on him the right, nor does it impose on him the duty, of carrying out the provisions of* [the husband's] *first will or of protecting those interested thereunder. The second ground for impeaching the second will is that at the time the testator executed it he was mentally incapable of making a testamentary dispossession, and that while in this condition he was induced… But here also the declaration discloses no reason whatever why the plaintiff should be allowed to avail himself of any of these grounds for the purpose of impeaching the second will. The only persons who could avail themselves of these grounds are the heirs ab intestato of the testator, but they are not before the Court, nor does the plaintiff profess to institute this action on their behalf.'*

[15] On the other hand the applicant argues that the finalisation of the litigation is paramount to the determination of the will's validity; and that the Master can only appoint an executor (whether testamentary or dative) once such validity or otherwise is determined. Were the court to refuse to authorise the applicant to pursue the litigation to finality, the deceased's estate will remain in limbo indefinitely. This, it is submitted, cannot be in the interests of the estate.

Discussion

[16] In order to decide this issue it is necessary to consider whether the applicant as interim curator has a legally enforceable right to approach the court and a sufficient interest in the relief claimed; at the same time being mindful of the warning given by Corbett CJ in *Gross and Others v Pentz* 1996 (4) SA 617 AD at 632F-G that there is no rule of law that permits a court to confer locus standi on a party, who otherwise has none, for the sake of expediency or to avoid impractical and undesirable results.

[17] Rademan's contention is that: (a) no such right exists; and (b) therefore the court cannot confer it. However this contention appears to me to be misplaced for the reasons that follow.

[18] In *Meiring* the court found that as executor dative of the first wife's estate the plaintiff had no locus standi to attack the validity of the husband's second will because his powers and duties extended only to the estate of the first wife. It is apparent from that judgment that the executor dative assumed (wrongly as the court found) that because he was charged with the administration of the first wife's estate his powers automatically extended to that of the husband's after her death by virtue of the initially executed mutual will.

[19] Moreover the powers and duties of the executor dative would have been circumscribed by the relevant legislation. However in matters concerning a deceased estate pending the appointment of an executor (whether testamentary or dative) our courts have adopted a different approach.

[20] In Meyerowitz on Administration of Estates and Estate Duty 2007 ed at 7-3 it is stated that:

> *'Where there is likely to be a long delay in the appointment of an executor or something beyond the authority of the person in possession of the deceased's property has to be done urgently, application may be made to the Master for the appointment of an interim curator…'*
>
> and at 7-4:

> '[referring to s 12(3)] *these are the limits of the powers which the Master can confer on a curator, and if for the better preservation of the estate the curator should have additional powers (e.g. to exercise an option or enter into a lease and the like), application should be made to court for supplementary powers. The court, it is considered, has inherent power to grant authority to do what is in the interest of or to the advantage of the estate.'*

[21] In support of this proposition Meyerowitz refers to various cases which were decided prior to the commencement of the Act, when its predecessor (the Administration of Estates Act 24 of 1913) and in turn its predecessor, were in operation.

[22] Sections 26 to 30 of the 1913 Act dealt with the custody of a deceased estate pending the issuing of what was then referred to as *'letters of administration'*. S 30 provided that:

> *'30(1) In all cases where the Master deems it expedient, he may appoint a curator bonis to take the custody and charge of any estate until letters of administration are granted for the due administration thereof.*
> *(2) Every such curator bonis may collect such debts and may sell or dispose of such perishable property belonging to the estate, wherever situate within the Union, as the Master may especially authorise.'*

[23] The cases to which Meyerowitz refers are the following: *In re Estate Alexander* 1912 CPD 1116, where the petitioner had been appointed executor in the deceased's will but such appointment was invalid, the court authorised him to conduct the deceased's business pending the appointment of an executor dative; *Ex parte McLennan* 1925 OPD 115, where the court authorised the Master to confer additional powers on a

curator bonis (now interim curator) to continue acting in terms of a general power of attorney so as to be able to conduct the deceased's business pending the appointment of an executor; *Ex parte Moffett* 1930 OPD 156, where the deceased failed to make a valid appointment of a testamentary executor and the court appointed a curator bonis with authority to sign a contract in circumstances where the two major heirs had consented and the court was satisfied that the contract would be beneficial to the minor heirs; *In re Estate Shepherd* 1934 NPD 311, where relief similar to *McLennan* was granted, including operating a bank account and making application for overdraft facilities in respect of the deceased's business until the appointment of an executor; and *Ex parte Adkins* 1937 EDL 188, where a curator bonis was appointed to run the deceased's hotel pending the winding-up of the estate. It must however be noted that in almost all of these cases the court required the curator bonis to provide suitable security to the Master.

[24] Perhaps the two most helpful cases upon which Meyerowitz relies are *Ex parte McEwan* 1930 WLD 325 and *Ex parte Craig* [1951] 1 All SA 78 (O).

[25] In *McEwan* the deceased had executed a general power of attorney in favour of the applicant, an attorney, to conduct his affairs while he lived in Wales. After the death of the deceased there was an urgent need to appoint an interim curator (or curator bonis in terms of s 30 of the 1913 Act). The applicant sought his appointment as curator bonis pending the issue of letters of administration, with special power to purchase a mortgaged property if he thought it advisable in the interests of the estate, and to prove the claim of the estate in the assigned estate of the mortgagor. In his report the

Master stated that although he had power to appoint a curator bonis in terms of s 30 of the 1913 Act, that power could not be exercised until proper proof of death had been provided. He offered no objection to the relief sought. The court made the following order:

> *'That applicant be appointed curator bonis of the estate of the late Williams, with full powers to represent and protect the interests of the estate pending the issue of letters of administration, subject to giving security to the satisfaction of the Master; with authority to prove the claim of the estate against the estate of* [the mortgagor]*, and to represent the estate of Williams in connection with* [the mortgagor's] *estate, to receive payments from the estate of* [the mortgagor] *and, should applicant think it necessary and expedient, to purchase the mortgaged property on behalf of the estate of Williams for such amount as he might consider expedient; the applicant to consult the Master as to the time and conditions of a resale of the mortgaged property; costs to come out of the estate of Williams.'*

[26] In *Craig* the applicant was appointed curator bonis by the Master in terms of s 30 of the 1913 Act. The applicant was also appointed heir under the deceased's will, but the validity of the will was being contested and an action was pending on that issue. The applicant sought special powers to be conferred upon him as curator bonis, inter alia authorising him to carry on the business of the deceased and to pay out pro rata to creditors an amount in cash which had become available as a result of collection of some of the outstanding debt due to the estate. The court held at page 79-80 that:

> *'The powers asked for appear to be necessary in order to conserve the assets of the estate, but in view of the pending litigation it seems to me that certain safeguards should be embodied to avoid, so far as that can be done, the possibility of prejudice to the party who has instituted the litigation referred to and, so far as possible, also to avoid any increase in the liabilities of the estate. That the Court has the power under circumstances such as these to grant the authority asked for appears from the*

> *decisions of this Court in* Ex parte McLennan*, 1925 OPD 115 and in* Ex parte Moffett *1930 OPD 156, the latter case being a decision by a full-Bench which is binding upon me. These cases have been referred to and followed in* Ex parte Adkins *1937 EDL 188 and* In re Estate Shepherd *1934 NPD 311. I am not unaware that some of these cases have been distinguished in the case of* Ex parte Lubbers & Others *1937 TPD 113, but it seems to me that that is not on all fours with the present case in that no curator bonis was there appointed, the application did not aim essentially at the preservation of estate assets and the applicant asked for authority to continue to exercise powers under a power of attorney given to him by the deceased during his lifetime.'*

[27] It is thus apparent that, at least subsequent to the 1913 Act, our courts have on numerous occasions recognised their inherent jurisdiction to specially authorise an interim curator to exercise such powers as are considered to be in the interest, or to the advantage, of the deceased estate concerned where there is likely to be a long delay before an executor is appointed.

[28] The applicant derives her locus standi by virtue of her appointment as interim curator. Such appointment conferred upon her the right to approach the court for the extension of her powers to conclude the litigation in the interests of the estate.

[29] The applicant also has sufficient interest in having the litigation finalised because it is only then that her appointment as interim curator may terminate. The Master cannot authorise her to finalise the litigation because it falls outside his statutorily conferred powers under s 12(3). The only respondent who opposes is Rademan who himself is the subject of scrutiny in the pending litigation. It is not the applicant who will make a determination on the validity of the will or whether Rademan is indeed indebted to the deceased estate; those are decisions for a court to make and the applicant will thus

not secure any advantage over Rademan if she is authorised to proceed with the litigation. Resolution of the disputed issues will only serve to the benefit of the estate because thereafter an executor (either testamentary or dative) may be appointed to have it wound up without further delay. The safeguard to ensure the applicant pursues the litigation to finality in a responsible manner and without prejudicing the estate can be addressed by ordering her to provide suitable security to the satisfaction of the Master and to work under his supervision to the extent that he deems it necessary.

[30] As to the relief sought by the applicant at prayers [a] [iii] and [vi], namely that she be authorised to place the deceased's assets in safe custody, to pay any attendant disbursements, and that she be authorised to make decisions concerning the deceased's share portfolio and investments, if necessary, my findings are as follows. The applicant has already been authorised by the Master to take the deceased's assets into her custody. It is thus logical to grant the applicant the authority to pay any related disbursements, and to make the necessary decisions concerning the deceased's share and investment portfolio, subject however to her similarly furnishing suitable security to the satisfaction of the Master and to make decisions concerning that substantial portfolio under his supervision.

[31] Section 8(4) of the Act provides:

> *'If it appears to the Master that any such document, being or purporting to be a will, is for any reason invalid, he may, notwithstanding registration thereof in terms of subsection (3), refuse to accept it for the purposes of this Act until the validity thereof has been determined by the Court.'*

[32] As far as the counter-application is concerned the Master has registered the will but is not prepared to accept or reject it until the validity thereof has been determined by the court. The Master's refusal to accept or reject the will in the face of the pending litigation which pre-dates the death of the deceased cannot be faulted. Whether he accepted or rejected the will, this would not have put an end to that litigation. Moreover it might have served to increase the cost to the estate because his decision may well have been taken on review. It is not the Master's function to pre-empt a decision of a court.

Conclusion

[33] **In the result the following order is made:**

1. **The applicant's powers as interim curator in the estate of the late Laureen Borngräber (*'the deceased'*) are extended as follows:**
   - **1.1 To proceed with the pending actions instituted by her in her capacity as curator bonis prior to the death of the deceased until their conclusion;**
   - **1.2 To effect payment of all disbursements reasonably incurred in connection with the safe custody of the assets of the deceased's estate;**
   - **1.3 To make the necessary decisions in respect of the deceased's share portfolio and investments, if required.**
2. **The powers conferred on the applicant in terms of paragraph 1 above shall be exercised subject to the following conditions:**
   - **2.1 The applicant shall furnish such additional security as the Master may require to his satisfaction; and**

2.2 The exercise of such powers shall take place under the Master's supervision to the extent that he deems it necessary.

3. The counter-application of the second respondent is dismissed.

4. The costs of the main application shall be borne by the deceased estate.

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J I CLOETE